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IN THE

Supreme Court of the United States

UNIVERSITY OF PHOENIX,

Petitioner,

v.

UNITED STATES EX REL. MARY HENDOW AND JULIE ALBERTSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN HEALTH CARE ASSOCIATION AND THE NATIONAL ASSOCIATION FOR THE SUPPORT OF LONG TERM CARE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The American Health Care Association ("AHCA") is one of the nation's leading long-term care organizations. AHCA is the national representative of more than 10,000 non-profit and proprietary facilities dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly and disabled citizens who live in nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities. The National Association for the Support of Long Term Care ("NASL") represents providers of ancillary products and services to the long-term care industry. Member companies provide therapy services, diagnostic services, software systems, and medical equipment and supplies to long-term care facilities. One way in which AHCA and NASL promote the interests of their members is by participating as *amici curiae* in cases with important and far-ranging consequences for their members—including cases arising under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. *See, e.g.*, Brief *Amici Curiae* for AHCA *et al.* in Support of Petitioners, *Rockwell Int'l Corp. v. United States ex rel. Stone*, No. 05-1272 (U.S. Oct. 26, 2006).

The question presented in the University of Phoenix's ("UOP") petition is of tremendous importance to *amici's* members. The federal government funds in full or in part a substantial percentage of the health services provided by *amici's* members, including under the Medicare and Medicaid statutes and accompanying regulations. These statutes and regulations have been described by this Court as "Byzantine" texts "among

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief. Petitioner has filed a letter with the Clerk granting blanket consent to any party wishing to file a brief in support of either petitioner or respondents, and respondents' written consent to the filing of this brief has been filed with the Clerk.

the most intricate ever drafted by Congress." *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981); *see also Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 13 (1999) (describing Medicare as a "massive, complex health and safety program . . . embodied in hundreds of pages of statutes and thousands of pages of often interrelated regulations").

Amici's members daily navigate the "morass of bureaucratic complexity" of the federal health care programs, *Herweg v. Ray*, 455 U.S. 265, 279 (1982) (Burger, C.J., dissenting), submitting thousands of claims a day to the Medicare and Medicaid programs. If providers cross one of the lines in these programs' "impenetrable" texts, *Rehabilitation Ass'n of Va., Inc. v. Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994), they may, if the decision below stands, expose themselves to potential liability under the FCA, which provides for treble damages and penalties of $5,500-$11,000 for every "false or fraudulent" claim knowingly presented to the government, 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(9). The FCA's *qui tam* provisions authorizing private citizens to sue on the government's behalf augment the statute's powerful arsenal of remedies—and also heighten the risk that violation of a rule will be elevated to an allegation of fraud. *See* 31 U.S.C. § 3730(b); *see also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943) (noting that *qui tam* relators often act "under the strong stimulus of personal ill will or the hope of gain'") (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885)). *Amici* therefore have a strong interest in seeing that their members can predict with reasonably certainty how the FCA will be applied.

SUMMARY OF ARGUMENT

The statutory language at the heart of this case—"false or fraudulent"—was enacted by Congress in 1863. Since that time, the exponential growth in the federal government's role in national economic life (e.g., as a heath insurer and guarantor of college loans) has resulted in a fundamental restructuring of the relationship between the federal government and the majority

of private entities with whom it contracts. Administrative agencies now maintain comprehensive systems to police compliance with the thousands of pages of statutes, regulations and other guidance defining private entities' eligibility to provide government benefits, often using specified remedies that allow contract payments to continue during periods of noncompliance.

Lower federal courts have struggled with how to apply the FCA in light of these changed circumstances. As evidence of that fact, the Ninth Circuit's decision below adopted a sweeping interpretation of "false or fraudulent" that nullified the Department of Education's discretionary decision to treat UOP's alleged statutory and regulatory infractions as an administrative enforcement matter, not as fraud upon the government. In so doing, the Ninth Circuit relied upon language in a 1986 Senate report whose description of the FCA this Court recently found to be of no value for determining the meaning of words enacted by the 1863 Congress. The Court should grant UOP's petition in order to provide guidance to the lower courts on the proper boundaries of the FCA as applied to heavily regulated industries.

ARGUMENT

REVIEW SHOULD BE GRANTED BECAUSE LOWER FEDERAL COURTS AND GOVERNMENT CONTRACTORS NEED GUIDANCE ON THE PROPER APPLICATION OF THE FALSE CLAIMS ACT TO THE MODERN ADMINISTRATIVE STATE

A. Historical Origins of the False Claims Act

The FCA is a Civil War era statute that, in those provisions relevant to this case, has remained substantively unchanged since its original enactment in 1863. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 ("1863 Act"). The statute was adopted "following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department." *United States v. McNinch*, 356 U.S. 595, 599 (1958). To combat military

contracting abuses, Congress created a damages cause of action that could be brought directly by the United States or on its behalf by private persons. *See* 1863 Act § 4.

The original FCA authorized suit against "any person . . . who shall make or cause to be made . . . any claim upon or against the Government of the Unites States . . . knowing such claim to be *false, fictitious, or fraudulent* . . . ." *Id.* § 1 (emphasis added); *see also id.* § 3 (making section 1 applicable to non-military members). It also authorized suit against any person "who shall, for the purpose of obtaining . . . the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any *false or fraudulent* statement . . .." *Id.* § 1 (emphasis added).

Congress recodified the FCA in 1982 and at the same time eliminated the word "fictitious" from the 1863 prohibition against "false, fictitious, or fraudulent" claims. *See* Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 877, 978. However, this minor textual change was designed only to "eliminate unnecessary words" and provide "consistency," rather than to enact any substantive change. H.R. Rep. No. 97-651, at 143 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 2037. The FCA was amended again in 1986. *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 ("1986 Amendments"). Importantly, the 1986 Congress did not define, amend or otherwise alter the words "false or fraudulent."

The current version of the FCA allows suit against any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a *false or fraudulent* claim for payment or approval." 31 U.S.C. § 3729(a)(1) (emphasis added). A second provision allows suit against any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a *false or fraudulent* claim paid or approved by the Government."

Id. § 3729(a)(2) (emphasis added). Congress has never defined the phrase "false or fraudulent."

B. The Civil War Era False Claims Act Was Not Designed To Apply to Contract Claims Made Upon the Modern Administrative State

At the time of its enactment in 1863, the majority of federal government contracts involved services and products to be delivered directly to the government on its own account. *See generally* James F. Nagle, *A History of Government Contracting* 181-220 (1st ed. 1992) (describing federal contracting during Civil War period). Moreover, the types of governmental benefit, entitlement and welfare programs at the heart of this case were not only unknown in 1863, programs of their type were generally believed to be no business of the federal government. *See* Lawrence M. Friedman, *A History of American Law* 439 (2d ed. 1985). Federal programs providing—and paying for—governmental benefits delivered by private sector entities simply did not exist at the time the FCA was adopted, nor did the federal government act in the myriad regulatory roles that it does today.

Likewise, the sorts of pervasive federal regulatory and oversight systems such as that at issue in this case—complete with their own systems to assess regulatory compliance, processes to adjudicate regulatory violations, standards to evaluate the significance of such violations, and discretion to decide whether a remedy or sanction is appropriate—were unknown to the Congress that adopted the FCA. *Cf. FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (noting that the "rise of administrative bodies probably has been the most significant legal trend of the last century" during which time agencies have become a "veritable fourth branch of the Government"). At the very least, the Congress that adopted the FCA would have found thoroughly novel the concept that FCA liability could be predicated on violation of a regulation adopted by a federal administrative agency that prescribes eligibility

standards for private entities wishing to provide government benefits at federal expense.

When compared to the time that the FCA was adopted, it is plain that the exponential growth in the importance of administrative agencies—to whom Congress has delegated the management and oversight of large federal benefit and social welfare programs, and the decision by Congress that government benefits created by those programs should be delivered by the private sector—has resulted in a novel and fundamental restructuring of the relationship between the federal government and the majority of entities with whom it contracts. With this growth in administrative authority has come a concomitant increase in the federal government's "economic role in national life . . . and with it the opportunities for those receiving government funds" to violate one or more of the innumerable regulations governing entitlement to provide government benefits. 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 1.01[B], at 1-11 (3d ed. 2005). Whether violation of such regulations makes a subsequent claim for payment "false or fraudulent" within the meaning of the FCA, however, is a question that never would have occurred to the framers of the statute.

The difficulty of reconciling the Civil War era FCA to the modern administrative state is exacerbated—and the need for this Court's guidance made manifest—because the various administrative agencies have been delegated the power to adopt substantive compliance standards; the discretion to assess the degree and level of a contracting entity's compliance with complex statutory and regulatory standards; the unreviewable discretion to determine what, if any, action to take in the face of noncompliance; and the permission to use remedial measures for non-compliance while allowing contract payments to continue. Indeed, in cases not involving the FCA, this Court has recognized that the existence of detailed and comprehensive regulatory and enforcement schemes indicates congressional

intent to preclude enforcement of the statute by anyone other than the agency to whom Congress has delegated enforcement discretion. *See, e.g.*, *Blessing v. Freestone*, 520 U.S. 329, 341 (1997); *Montana-Dakota Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951). If the FCA is an exception to that long-settled rule, such exception ought to be announced and rationally explained by this Court, not presumed *sub silentio*.

This case illustrates these points in the most concrete terms. Respondents, private individuals, alleged that UOP, a proprietary university that contracts with the Department of Education to provide services, violated the FCA by knowingly violating a ban on incentive compensation for college recruiters. *See* Pet. App. 3a. However, consistent with its stated policy, *see id.* 52a, the Department of Education exercised its discretion to continue making payments to UOP and to treat the university's alleged violation of the ban on incentive compensation as a regulatory enforcement matter. The agency and the university eventually reached a settlement that "did not require UOP to repay any of the financial aid received by its students, change any of its practices for compensating admissions counselors, or discipline any of its employees." Pet. at 6.

This Court should grant review because this scenario raises at least four important questions in cases such as this one. First, assuming for the sake of argument that a claim for payment can be "false or fraudulent" based on a regulatory violation, is it the province of a court to determine the existence of the predicate regulatory violation when Congress has committed such decisions to agency discretion? Second, because administrative agencies determine the existence of regulatory violations using their own unique and generally informal procedures (or using the procedures and protocols mandated by Congress), is it appropriate for courts to determine the predicate regulatory violation using the Federal Rules of Civil Procedure and the Federal Rules of Evidence? Third, because statutes creating public benefit programs generally confer broad discretion on

the administrative agencies to select a discretionary response to a regulatory violation that, as here, often permits continued payment for services, is it appropriate for a court to apply the remedies provided by the FCA to recoup as damages payments that the enforcement agency has determined were appropriate despite the existence of one or more regulatory violations? Finally, if it is appropriate for courts to allow FCA actions brought directly by the government in the circumstances described above, is it nonetheless inappropriate to permit such actions to be brought by a private relator, who is a complete stranger to the discretion that Congress conferred on an administrative agency to weigh the nature of any violation, consider the competing interests and decide what, if any, enforcement action is appropriate?

No place is the tension inherent in these questions more evident or more prevalent than in the health care context. The federal government is the largest single purchaser of health care in the United States. Two entitlement programs enacted in 1965, Medicare and Medicaid, account for the majority of federal health care spending. *See* Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286. In 2006, the Medicare and Medicaid programs accounted for approximately 21 percent of all federal spending. Cong. Budget Office, *The Budget and Economic Outlook: Fiscal Years 2008 to 2017* 54 (Jan. 2007) (noting that federal Medicare and Medicaid spending totaled $555 billion in 2006).

The vast majority of benefits created by the Medicare and Medicaid programs are provided by private entities, such as the providers represented by *amici*, pursuant to a statutorily mandated contract. The federal regulations governing eligibility for a nursing facility provider agreement include dozens of separate requirements and cover every aspect of care delivery, from facility administration to activities programs and everything in between. The need for this Court's review is illustrated by the implicit tension between the regulatory system

established by Congress and enforced by the Secretary of Health and Human Services ("Secretary"), on the one hand, and the use of the FCA to recover treble damages and penalties for claims that are allegedly "false or fraudulent" because a nursing home provider has violated one or more of the same eligibility standards. This tension arises from: (1) the differing processes used by the Secretary and the courts to determine the existence of a regulatory violation; and (2) the extent of the discretion committed by law to the Secretary to craft a response to any regulatory violation and the range of possible responses, including—as in the case before this Court—continued payment for services notwithstanding the existence of a regulatory violation.

For example, in contrast to the judicial process, the Medicare and Medicaid Acts provide that determinations of compliance with program statutes and regulations must be made in an onsite inspection using prescribed methodologies that bear no relation to the judicial fact-finding process. The inspection, according to the Acts, must be conducted using a survey protocol—including forms, procedures, guidelines and methodologies—that the Secretary has "developed, tested, and validated." 42 U.S.C. §§ 1395i-3(g)(2)(C), 1396r(g)(2)(C). The team of inspectors, known as "surveyors," determines whether the nursing home is in *substantial* compliance with the regulations governing participation in the Medicare and Medicaid programs. *See* 42 C.F.R. §§ 488.26, 488.301. The survey team must include a "multidisciplinary team of professionals," including at least one registered nurse. 42 U.S.C. §§ 1395i-3(g)(2)(E), 1396r(g)(2)(E).

In further contrast to the judicial process, surveyors must use a "case-mix stratified sample of residents" to evaluate "the quality of care furnished, as measured by indicators of medical, nursing, and rehabilitative care, dietary and nutrition surveys, activities and social participation, and sanitation, infection control, and physical environment." *Id.* §§ 1395i-3(g)(2)(A)(ii),

1396r(g)(2)(A)(ii). Surveyors are to "directly observe the actual provision of care and services to residents, and the effects of that care, to assess whether the care provided meets the needs of individual residents." 42 C.F.R. § 488.26(c)(2). Failure to utilize the prescribed protocol renders the results of the inspection invalid. *Id.* § 488.26(c)(4).

If, during a certification inspection, the facility is not in compliance with Medicare and Medicaid program requirements, the Secretary has discretion to impose a variety of remedies on the nursing home. 42 U.S.C. §§ 1395i-3(h)(1), 1396r(h)(1). Some of the sanctions or remedies that may be imposed include termination of a provider's ability to participate in the Medicare and Medicaid programs, denial of payments to the provider, placement of a temporary manager or state monitor in the facility, and civil money penalties up to $10,000 per incident for each day that the violation existed. *Id.* §§ 1395i-3(h)(2), 1396r(h)(2). In order to select the appropriate sanction, surveyors are required to classify deficiency findings by seriousness. 42 C.F.R. § 488.404(b). Seriousness is assessed by evaluating the severity of the deficiency (i.e., the degree of actual and potential harm), in conjunction with the scope of the deficiency (i.e., the degree to which it is pervasive or isolated). *Id.* §§ 488.404(b), 488.404(e)(i)-(iii), 488.410(a). In contrast to the FCA, the selection of an appropriate remedy also must be based on the Secretary's assessment of the "most effective remedy . . . to assure the protection of the well-being of the resident population," 59 Fed. Reg. 56,116, 56,123 (Nov. 10, 1994), as well as the facility's "prior history of noncompliance," 42 C.F.R. § 488.404(c)(2). Indeed, one of the principal purposes of the comprehensive nursing home legislation that Congress passed in 1987 was to expand and confer discretion on the Secretary to continue Medicare and Medicaid payments even where nursing homes had regulatory compliance issues. *See* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, §§ 4201-4218, 101 Stat. 1330, 1330-160 to 1330-221.

The need for reconciliation of the FCA as applied to the modern administrative state is most starkly demonstrated by the Medicare Act's comprehensive ban on judicial interference with the Secretary's discretion to administer the Medicare program. Specifically, Congress explicitly recognized the vital importance agency discretion would play in the program's proper administration by channeling through the Secretary "any claim arising under" the Medicare Act. 42 U.S.C. § 1395ii (incorporating 42 U.S.C. § 405(h)). In the words of Congress: "No findings of fact or decision of the [Secretary] shall be reviewed by *any* person, tribunal, or governmental agency" except as specifically authorized by Congress. *Id.* § 405(h) (emphasis added). Yet, a claim for payment cannot be false under the FCA unless a court does precisely what this Court has said only the Secretary can do—determine compliance with program standards. *See Illinois Council*, 529 U.S. at 13 (ruling that § 405(h) jurisdictional bar applies irrespective of whether plaintiff challenges agency's action on evidentiary, rule-related, statutory, constitutional or other legal grounds).

C. Lower Courts Have Struggled To Apply the False Claims Act to Contractors Subject to Complex Regulatory, Enforcement and Remedial Programs

The threshold question in many FCA cases—as it is here—is whether the defendant actually presented a "false or fraudulent" claim within the meaning of the FCA. The absence of a statutory definition for the phrase "false or fraudulent," coupled with a lack of definitive guidance from this Court on the subject, has required the lower federal courts to craft various devices for determining how the FCA applies to entities who are subject to complex regulatory, enforcement and remedial programs and, while arguably in violation of one or more program requirements, submit claims for payment.

For example, courts have used various derivatives of the "express false certification" theory whereby the contractor's allegedly false certification of compliance with a federal statute

or regulation renders subsequent claims "false or fraudulent." *See, e.g., United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432, 441 (3d Cir. 2004). In recognizing this theory, at least one court has looked to the "causal chain" leading to payment as opposed to the proximity between the time of the alleged false certification and the claim for payment, *see United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005), while others have stated that the false certification must tie directly to the government's decision to pay a claim, *see United States ex rel. Gross v. AIDS Research Alliance-Chicago*, 415 F.3d 601, 605 (7th Cir. 2005); *United States ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 382-83 (5th Cir. 2003); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902-03 (5th Cir. 1997).

In recognizing that only a subset of admittedly false claims should be subject to punishment under the FCA, other courts ask the additional question of whether the certification was in fact "material" to the government's decision to pay the claim. *See, e.g., United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 444 (6th Cir. 2005); *Mikes v. Straus*, 274 F.3d 687, 689 (2d Cir. 2001); *Harrison*, 176 F.3d at 788. However, even those courts that recognize an additional "materiality" requirement disagree as to what standard to apply. *See Medshares*, 400 F.3d at 445 (discussing circuit split between "outcome materiality" and "natural tendency" tests for determining materiality).

Some courts have gone further by imposing liability under the FCA in the absence of an express certification, ruling that the mere act of seeking payment *implicitly* certifies that the contractor has performed in conformance with all statutes and regulations. *See, e.g., Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 532 (10th Cir. 2000); *Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 434 (1994), *aff'd*, 57 F.3d 1084 (Fed.

Cir. 1995) (unpublished table decision). While certain courts have expressed doubt about the validity of the implied false certification theory, *see, e.g.*, *Harrison*, 176 F.3d at 786 n.8, others have attempted to confine its reach by placing strict limits on its use, *see Mikes*, 274 F.3d at 699 (limiting use of implied false certification theory to cases where the "underlying statute or regulation upon which the plaintiff relies *expressly* states" that the contractor must comply in order to get paid).

Lower court difficulties over how to apply the FCA to heavily regulated industries is exemplified by a series of Fifth Circuit decisions in a case involving rent subsidies provided by the Department of Housing and Urban Development ("HUD"). *See United States v. Southland Mgmt. Corp.*, 288 F.3d 665 (5th Cir. 2002) ("*Southland I*"), *rev'd*, 326 F.3d 669 (5th Cir. 2003) (en banc) ("*Southland II*"). In the *Southland* cases, the initial panel majority joined a subsequent en banc decision that held the initial panel's ruling permitting an FCA action was inconsistent with and precluded by the administrative enforcement scheme.

In their monthly requests for rent subsidies, the owners of an apartment building certified, as required by HUD regulation and the owners' agreement with the agency, that their building was maintained in a decent, safe and sanitary condition. *See Southland I*, 288 F.3d at 671. The government initiated an FCA suit against the building's owners after they failed to rectify concerns raised by HUD regarding the building's deteriorating condition, despite the fact that HUD had continued to make rent subsidy payments with full knowledge of the building's condition. *See id.* at 673. A divided panel of the Fifth Circuit initially held that the FCA provided a viable cause of action under these circumstances, saying that "when the government has conditioned payment of a claim upon a claimant's certification of compliance with a provision of a contract entered into pursuant to a regulation, a claimant submits a false claim *as a matter of law* when he or she falsely certifies compliance

with that provision." *Id.* at 679. After rehearing en banc, however, a ten-judge majority—that included the two judges who had initially decided in favor of the government—voted instead that no FCA cause of action arose because no "false" claims had been submitted within the meaning of the FCA. *See Southland II*, 326 F.3d at 675. No "false" claims were submitted, the majority reasoned, because the rent subsidy contract itself specified remedies for dealing with noncompliance and provided that during such time, rent subsidy payments would continue. *See id.* at 676.

The false certification theory has also been applied to the health care industry. For example, in *Mikes*, a former employee of a physician practice filed suit alleging that her former employer sought and received Medicare reimbursement for tests that were improperly performed, thereby making the test results unreliable and the claims for reimbursement "false or fraudulent." *See* 274 F.3d at 693. Confronted with the fact that neither Congress nor this Court has defined "false or fraudulent," the Second Circuit resorted to *Webster's Dictionary* for guidance in an attempt to understand what it was exactly that Congress sought to prohibit in the FCA. *See id.* at 969. The court of appeals eventually concluded that the statute was aimed at claims that attempted to extract money the government otherwise would not have paid. *Id.* The *Mikes* court cautioned, however, that the FCA does "not encompass those instances of regulatory noncompliance that are irrelevant to the government's disbursement decisions." *Id.* at 697. In the words of the Second Circuit, "the [FCA] was not designed for use as a blunt instrument to enforce compliance with all . . . regulations—but rather only those regulations that are a precondition to payment . . . ." *Id.* at 699.

In the leading Ninth Circuit case to have addressed the false certification theory prior to the decision below, the court of appeals rejected a relator's attempt to bootstrap certain regulatory violations into an actionable FCA case. The court in *United*

States ex rel. Hopper v. Anton, 91 F.3d 1261 (9th Cir. 1996), correctly noted that "[i]t is not the case that any breach of contract, or violation of regulations or law, or receipt of money from the government where one is not entitled to receive the money, automatically gives rise to a claim under the FCA." *Id.* at 1265. Recognizing the presence of administrative remedies to address such issues, the *Hopper* court held that in order for a regulatory violation to be actionable under the FCA, compliance with the regulation at issue had to be a *sine qua non* of payment. *Id.* at 1267.

In effectively overruling *Hopper*, the Ninth Circuit's decision below disregarded the important distinction between those requirements that actually affect the government's decision to pay and those that do not. According to the court, "if [it] held that conditions of participation were not conditions of payment, there would be no conditions of payment at all—and thus, an educational institution could flout the law at will." Pet. App. 16a. Such is clearly not the case, as the facts below clearly demonstrate. Rather than allowing UOP to "flout the law at will," the Department of Education conducted an investigation and exercised its discretion to continue making payments to UOP and to treat the school's alleged violation of the ban on incentive compensation as a regulatory enforcement matter. *See* Pet. at 6. By imposing FCA liability under these circumstances, the court of appeals usurped agency discretion by substituting its judgment for that of the Department of Education.[2]

[2] The Ninth Circuit also held that respondents stated a viable cause of action under the so-called "promissory fraud" theory of FCA liability, which holds that liability may attach to each claim submitted under a contract when that contract was originally obtained through false statements or fraudulent conduct. *See* Pet. App. 11a. Despite the requirement to plead fraud with particularity imposed by Rule 9(b) of the Federal Rules of Civil Procedure, the court of appeals did not require respondents to plead specific facts demonstrating the falsity of promises (Cont'd)

D. Lower Courts Need Guidance on How To Apply the False Claims Act in the Context of Heavily Regulated Industries

Most courts that have recognized the false certification theory rest their decisions not on the language of the FCA itself, but on a 1986 Senate committee report said to evidence that the words "false or fraudulent" should be broadly construed to include claims based on statutory and regulatory violations. *See, e.g.*, *Mikes*, 274 F.3d at 697 (citing S. Rep. No. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5265, 5274); *Shaw*, 213 F.3d at 531 (same); *Harrison*, 176 F.3d at 786 (same). For example, the Ninth Circuit below explained that "in amending the False Claims Act in 1986, Congress emphasized that the scope of false or fraudulent claims should be broadly construed . . ." Pet. App. 6a. The court of appeals then quoted the following language from Senate Report 345 in support of that proposition: "[E]ach and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim." *Id.* (quoting S. Rep. No. 99-345, at 9).

However, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court found the exact same Senate report to be of *no* value for discerning the meaning of terms that were not added to the FCA in 1986 or

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made *at the time those promises were made*, and instead allowed allegations of regulatory violations to function as "proof" of the promises' falsity. *See id.* at 13a. The Ninth Circuit's decision renders meaningless Rule 9(b)'s pleading requirement, thereby allowing relators to use unspecified allegations to prolong already costly litigation. The decision also conflicts with those from the D.C. and Fifth Circuits. *See United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1329-30 (D.C. Cir. 2005); *Willard*, 336 F.3d at 386.

otherwise amended by the 1986 Congress. In *Stevens*, the Court addressed whether the FCA's use of the word "person" included a state. *See id.* at 780. Ruling that a state was not a "person," the Court flatly rejected language in Senate Report 345 to the contrary. *See id.* at 783 n.12. The passage of Senate Report 345 at issue in *Stevens* purported to describe the law as it then existed at the time Congress enacted the 1986 Amendments. According to the Court, the passage did nothing more than "set[] forth a Senate Committee's (erroneous) understanding of the meaning of the statutory term enacted some 123 years earlier." *Id.* Similarly, that report's sweeping pronouncements on the meaning of "false or fraudulent"—words that originate in the 1863 Act—are of limited value in the instant case.

Putting aside questions regarding the false certification theory's statutory basis, important policy considerations counsel in favor of this Court granting UOP's petition. This Court has not yet determined how the FCA should be applied in the context of heavily regulated government contractors who are confronted with thousands of pages of statutes and agency regulations, manuals and other informal guidance. For example, this Court has not determined how falsity should be defined in the regulatory context, nor has it addressed the effect overzealous private application of the FCA has on programs whose administration is conferred to agency discretion by Congress. *See, e.g., United States ex rel. Windsor v. DynCorp, Inc.*, 895 F. Supp. 844, 852 (E.D. Va. 1995) (finding it impossible to determine whether defendant submitted false claims because to do so would bypass carefully crafted administrative scheme established by Congress).

Indeed, the statutory and regulatory framework within which *amici's* members operate demonstrates that periodic non-compliance by nursing homes is anticipated and built into the administration of the Medicare and Medicaid programs. To illustrate, nursing homes in the nine states comprising the circuit in which this case arose currently average nine regulatory

deficiencies on their annual surveys.[3] The goal of Congress, and the fundamental purpose of the alternative remedies used in the course of administering the Medicare and Medicaid programs, is to create incentives for providers quickly to come back into substantial compliance with program requirements. As the District Court for the Eastern District of California aptly noted:

> To allow FCA suits to proceed where government payment of Medicare claims is not conditioned on perfect regulatory compliance—and where HHS may chose to waive administrative remedies, or impose a less drastic sanction than full denial of payment—would improperly permit *qui tam* plaintiffs to supplant the regulatory discretion granted to HHS under [federal law], essentially turning a discretionary denial of payment remedy into a mandatory penalty for failure to meet Medicare requirements.

United States ex rel. Swan v. Covenant Care, Inc., 279 F. Supp. 2d 1212, 1222 (E.D. Cal. 2002). Judicial determination that claims submitted during periods of noncompliance are "false or fraudulent" not only substitutes judicial fact-finding and discretion for the administrative process and discretion created by the Medicare and Medicaid Acts, it is at odds with the goals of the remedial scheme established by Congress in 1987.

E. Government Contractors Who Operate in Heavily Regulated Industries Need Definitive Judicial Guidance on How the False Claims Act Will Be Applied

The number of FCA lawsuits has grown dramatically over the past two decades. The health care industry has faced the brunt of this upsurge.[4] While the United States government

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[3] *See* Ctrs. for Medicare & Medicaid Servs., *Nursing Home Compare*, http://www.medicare.gov/NHCompare.

[4] *See* GAO, Letter to Hon. F. James Sensenbrenner, Jr., Hon. Chris (Cont'd)

pursues about one-third of those lawsuits, many of the remaining actions are prosecuted by relators alone, who are motivated in large part by the statute's contingent bounty provision and who are not constrained by concerns as to what impact their suits will have on the health care delivery system. *Cf. Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) ("*Qui tam* relators are . . . less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc."). In many cases, relators effectively usurp agency authority and discretion, exalting punishment and pecuniary gain over all other considerations.

The overwhelming majority of the health care *qui tam* cases in which the United States does not intervene produce no recovery for the United States (or the relator) and a substantial number of those cases are dismissed, but only after burdensome and expensive pre-trial litigation. *See, e.g., United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 556-61 (8th Cir.), *cert. denied*, 127 S. Ct. 189 (2006); *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1309 (11th Cir. 2002).

The financial consequences of running afoul of the FCA can be extraordinary. The statute not only provides for treble damages, it also authorizes penalties of up to $11,000 *per claim*. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(9). Industries that submit thousands of claims each day, such as the long-term care industry, currently operate in the uncertainty that comes from not knowing how a court will apply concepts such as the false certification theory.

The need for definitive judicial guidance is further amplified by the fact that FCA enforcement policy is shaped in large part

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Cannon, and Hon. Charles E. Grassley, *Information on False Claims Act Litigation* 28 (Jan. 31, 2006) (noting that 45.98 percent of *qui tam* cases involved alleged health care fraud).

by self-deputized relators who sue on behalf of the government seeking a bounty. Such persons wield extraordinary power and are not subject to adequate control by the Executive Branch. Judicial uncertainty regarding what constitutes a "false or fraudulent" claim within the meaning of the FCA often places extraordinary pressure on companies to settle otherwise-unmeritorious suits rather than risk financial ruin caused by an adverse ruling under the FCA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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